Legal Services of Northern California *and* Northern United Legal Assistance Workers, National Organization of Legal Services Workers, UAW Local 2320.[1] Case 20–CA–32863

May 16, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 7, 2006, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the stipulated record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

The complaint in this case alleges that the Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with a requested copy of a separation agreement between the Respondent and employee Kimberley Dovey. The Respondent argued that it did not have to provide the separation agreement because the agreement did not involve a term or condition of employment, and, in any event, it was privileged as confidential. The judge recommended dismissing the complaint. Although the judge rejected the Respondent's confidentiality defense, he found that the Union failed to establish that the document was relevant to the collective-bargaining process, or to the Union's role as collective-bargaining representative, because the document's sole purpose was to settle a potential private tort claim between Dovey and the Respondent.

For the reasons set forth below, we reverse the judge and find that the separation agreement was relevant to the Union's role as collective-bargaining representative. In addition, for the reasons stated by the judge, we find that the separation agreement was not a confidential document, privileged from disclosure.[3] Accordingly, we find that the Respondent violated Section 8(a)(5) by failing to provide the Union with a copy of the separation agreement.

Facts[4]

The Respondent and the Union are parties to a collective-bargaining agreement in effect from February 24, 2004, to February 29, 2008. The collective-bargaining agreement contains, among other things, provisions governing separation from employment, including specific guidelines for severance in the event of a layoff.

On July 15, 2005,[5] unit employee Dovey and the Respondent entered into a separation agreement. On July 29, Union President Laurel Blankenship wrote the Respondent stating that Dovey had resigned due to "the unbearably stressful work environment there. The Union was neither informed nor involved in this negotiation." Blankenship's letter requested "any and all documents signed by [the Respondent] and/or employee Kim Dovey (signed during July 2005) regarding termination of her employment, severance pay, and/or release of claims." Blankenship's letter also stated that, because the separation agreement was made without the Union's knowledge, the Respondent's conduct may constitute unlawful "direct dealing."[6]

The Respondent did not provide the Union with the requested separation agreement.[7] Instead, on August 15, the Respondent's executive director, Gary Smith, e-mailed Blankenship stating that Dovey had voluntarily terminated her employment, and that the Respondent had not engaged in any direct dealing with Dovey over the terms or conditions of her employment.

In a September 12 letter to Smith, and in an e-mail sent him the same date, Blankenship repeated the Union's request for "copies of any and all documents signed by [the Respondent] and/or Kim Dovey (signed during July 2005) regarding termination of her employment, severance pay relating to her termination of employment, and/or release of claims." By e-mail on September 20, Smith responded that "As I stated in my e-mail-message of August 15 . . . [the Respondent] has not executed any agreements with Kim Dovey (or any other [union] mem-

[1] The caption has been amended to reflect the correct name of the Charging Party.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] The Respondent did not except to this finding.

[4] The parties stipulated to the facts in this case.

[5] All dates are 2005, unless otherwise specified.

[6] The letter further inquired whether the Respondent negotiated individual separation agreements with other employees within the previous 2 years, and requested copies of any such documents. That additional information is not encompassed by the instant 8(a)(5) charge.

[7] Although the complaint refers to the "severance agreement" between the Respondent and Dovey, the document, submitted under seal to the judge, is entitled "Separation Agreement."

ber) pertaining to the terms or conditions of their employment."

The Judge's Decision

Although the separation agreement was not provided to the Union, a copy was submitted under seal to the judge, who examined it *in camera*. In his decision, the judge made the following findings with respect to this document:

> 1. The document is titled "Separation Agreement;" 2. it constitutes Dovey's resignation; 3. it recites that she has been paid her earned salary, vacation pay and any other amounts owed through the termination date; 4. it provides for a lump sum in exchange for a release of any tort claims arising from her employment, listing various statutes and common-law theories which might support such a claim; 5. it includes a limited nondisclosure clause barring her from advising others concerning the terms of the agreement, along with certain exceptions, such as being required by law to disclose its terms and also allowing her to disclose those terms to her spouse, her attorney, her accountant and any other professional advisor who might need the information. It provides Respondent with a legal remedy if she were to breach the nondisclosure clause. [Footnote omitted.]

In determining whether the Respondent's refusal to furnish the Union with a copy of the separation agreement violated Section 8(a)(5), the judge first considered whether the separation agreement was relevant to either the collective-bargaining process or to the Union's role as the employees' collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). He found that it was not. The judge reasoned that the Union did not have a bargaining purpose for requesting the information because the collective-bargaining agreement did not expire until 2008. The judge also found that the Union's information request did not cite to a valid contract-policing purpose, finding no evidence that any employee had complained about any matter relating to Dovey's separation from employment. The judge then found that the Union's information request did not demonstrate a valid representational purpose. The judge noted that although the Union's request cited to a vague direct dealing allegation, the details of such allegations were never explained. In addition, the judge found that there was no evidence that the Union sought to represent Dovey in negotiating the separation agreement.

Finding that the Union had failed to establish a contractual or representational purpose for requesting a copy of the separation agreement, the judge posited that the Union was seeking to review Dovey's waiver of a tort claim, which formed the basis for her separation from employment with the Respondent. The judge stated that the separation agreement functioned as a waiver of this tort claim, for which Dovey received compensation from the Respondent, and its purpose was outside the Union's representational purview. As stated by the judge, "once [Dovey] decided to waive her tort claim, [the only issue] was to negotiate an amount that would satisfy her personal sense of how she had been wronged. That is not a wage or term and condition of employment and no party has cited to a case holding that it is." On this basis, the judge concluded that the Respondent did not violate Section 8(a)(5) by failing to provide the Union with a copy of the separation agreement.

The Parties' Positions

In their exceptions, the General Counsel and the Charging Party argue that the judge relied on facts outside the stipulated record in finding that: Dovey suffered a tort; she chose not to consult with the Union over that tort claim; and she independently negotiated the separation agreement with the Respondent. The General Counsel argues that although the Respondent inserted and argued these facts in its position paper, they were not part of the stipulated record, and thus there is no factual basis to find that the separation agreement's purpose was to waive a private tort claim between Dovey and the Respondent.

The General Counsel also argues that the judge erred in finding that the separation agreement was not presumptively relevant to the Union's duty to police the terms of the collective-bargaining agreement. The General Counsel argues that the agreement involves mandatory subjects of bargaining, including Dovey's waiver of her rights under the collective-bargaining agreement and the National Labor Relations Act. The General Counsel urges the Board to find that the judge erred in concluding that the Respondent did not violate Section 8(a)(5) by refusing to provide the Union with a copy of the separation agreement.

In its answering brief, the Respondent acknowledges that the judge restated certain facts from its position statement, but argues that the judge did not rely on facts outside the stipulated record, and that the intent of the separation agreement to serve as a waiver of a tort claim is evident from the document itself. The Respondent further contends that the separation agreement did not specifically include a waiver of Dovey's rights under the NLRA. The Respondent concludes that the judge correctly found that the separation agreement was a private release of a tort claim between Dovey and the Respondent, and that the Union failed to show any legitimate

representational purpose for its request for a copy of the document.

As explained below, we find, contrary to the judge, that the Respondent was obligated to provide the Union with a copy of the requested separation agreement, and its refusal to do so violated Section 8(a)(5) of the Act as alleged.

Discussion

Upon request, an employer must provide relevant information necessary for the union to effectively represent employees under the terms of a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). Terms affecting mandatory subjects of bargaining are considered relevant. Id. Where information is relevant to a union's performance of its role as collective-bargaining representative, the Board will find that an employer violates the Act by failing to provide it. *Transcript Newspapers*, 286 NLRB 124 (1987), enfd. 856 F.2d 409 (1st Cir. 1988) (employer unlawfully refused to provide unions with a copy of its sales agreement, which was relevant to unions' roles as collective-bargaining representatives).

Here, the document submitted under seal to the judge includes an explicit waiver of Dovey's rights under the collective-bargaining agreement. As the Board has previously found, an employer violates the Act when it requires or solicits employees to waive their rights under a collective-bargaining agreement without the union's knowledge or assent. See generally *Resco Products,* 331 NLRB 1546, 1547–1548 (2000) (finding that employer violated Section 8(a)(5) by requiring that employees waive, without union's knowledge or consent, contractual vacation pay benefits). See also *Kaiser-Permanente Medical Care Program*, 248 NLRB 147 (1980) (employer violated the Act by soliciting employees to waive their contractual right to overtime pay in exchange for preferred work schedules). Accordingly, the Respondent is required to provide the Union with a copy of this information.[8]

We therefore find that the separation agreement executed between Dovey and the Respondent affects mandatory subjects of bargaining, and constitutes information that is relevant to the Union's role as the employees' collective-bargaining representative. Thus, the Respondent violated Section 8(a)(5) by refusing to provide the Union with a copy of the separation agreement.

ORDER

The Respondent, Legal Services of Northern California, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, Northern United Legal Assistance Workers, National Organization of Legal Services Workers, UAW Local 2320, by failing and refusing to provide the Union with the information requested by its letters dated July 29 and September 12, 2005, and its e-mail dated September 12, 2005.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish the Union with the information it requested in its letters of July 29 and September 12, 2005, and its e-mail dated September 12, 2005.

(b) Within 14 days after service by the Region, post at its Sacramento, California office copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of this notice to all employees employed by the Respondent at any time since July 29, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

[8] Because we find that the separation agreement is relevant because of its waiver of rights under the collective-bargaining agreement, we find it unnecessary to address the judge's finding that the separation agreement is not presumptively relevant. We similarly find it unnecessary to address the General Counsel's and Union's contention that the judge relied on facts outside of the stipulated record in finding the agreement not presumptively relevant.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 16, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union, Northern United Legal Assistance Workers, National Organization of Legal Services Workers, UAW Local 2320, by failing and refusing to provide the Union with the information requested by its letters dated July 29 and September 12, 2005, and its e-mail dated September 12, 2005.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL promptly furnish the Union with the information it requested in its letters of July 29 and September 12, 2005, and its e-mail dated September 12, 2005.

LEGAL SERVICES OF NORTHERN CALIFORNIA

Lucile Lannan Rosen, for the General Counsel.
Mary K. Nebgen (Orrick, Herrington & Sutcliffe), of Sacramento, California, for the Respondent.
Elizabeth Fiekowsky, Regional Organizer, of Cotati, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case has been submitted to the Division of Judges upon a joint motion of the parties who seek a decision based upon a hearing waiver and formal stipulation of facts signed on April 28, May 25 and 29, 2006. The factual stipulation was signed by all parties on May 25, 2006. In addition, each party has filed a so-called "Statement of Position" accompanying the stipulation. Associate Chief Administrative Law Judge Mary M. Cracraft granted the motion on June 6, 2006, and assigned the case to me for decision.

Northern United Legal Assistance Workers, National Organization of Legal Services, UAW Local 2320 (the Union or Charging Party), filed the underlying unfair labor practice charge on January 20, 2006. The Regional Director for Region 20 issued the complaint on March 23, 2006. It alleges that Legal Services of Northern California (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or the Act) by failing to comply with the Union's demand to produce the severance agreement (or severance "package") between it and its former employee, Kimberley Dovey. The complaint further asserts that the Dovey severance agreement is "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the [represented employees]." Respondent's answer agrees that the Union holds Section 9(a) status and is the employees' exclusive collective-bargaining representative.[1] Respondent's answer, however, denies that the Union requested Dovey's separation agreement; it asserts that the Union demanded the Dovey separation "package." It also denies that the package is necessary for the Union's performance of its representational duties. Affirmatively, it asserts the package to be confidential.

Pursuant to an order issued by the associate chief administrative law judge, all parties have timely filed briefs in support of their respective positions. They have been carefully considered. Based upon the pleadings and the stipulation of facts, I hereby make the following findings.

Jurisdiction

Based on the stipulation, Respondent, Legal Services of Northern California, is a California corporation with an office and place of business in Sacramento. It provides free legal services to clients in 23 counties in Northern California. During the 12-month period ending December 31, 2005,[2] Respondent's gross revenues exceeded $250,000, and during the same period it purchased and received at its Sacramento facility goods valued in excess of $2500 which originated outside California. Accordingly, Respondent at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, the stipulation recites that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Operative Facts

The stipulation sets forth some of the operative facts. It first recites that Dovey was a bargaining unit employee until she

[1] The collective-bargaining contract shows the unit to include staff attorneys, legal graduate assistants, paralegals, legal secretaries, administrative support clerks, and receptionists.

[2] Unless otherwise noted, all dates are 2005.

agreed to, and executed, the separation agreement on July 15. It also sets forth the correspondence between the Union and Respondent which constitutes the demand under scrutiny here and the manner in which the nature of the demand shifted.

Specifically, on July 29, Laurel Blankenship, the Union's president, wrote Respondent's Executive Director Gary Smith a letter in which she initially asserted that Dovey's "severance package" had been reached without the Union's knowledge or involvement. She suggested that Respondent's conduct may have breached the good-faith bargaining obligation under Section 8(d) of the Act as constituting improper direct dealing over matters reserved by law to the Union. Blankenship thereupon asked for a copy of the "package."

Smith responded on August 15 by e-mail. Inter alia, he said: "I have reviewed the concerns raised in [the July 29 letter] in connection with the resignation of a staff member. Although issues of confidentiality and the employee's privacy rights preclude me from discussing the manner in detail, I can assure you that the employee's decision was entirely voluntary, and that no one from [ ] management pressured, requested, or suggested in any way that the employee resign. After the employee approached [management] and notified the Managing Attorney [Herb Whitaker] of her intent to resign, [Respondent] did not engage in any improper "direct dealing" with an employee whatsoever with respect to any "terms and conditions of employment." He closed by correcting a perceived misimpression to the effect that one of Respondent's office managers had participated in the discussion with the employee concerning her resignation. He said those discussions were only between the employee (Dovey) and the managing attorney.

On September 12, Blankenship e-mailed Smith to remind him that he had not responded to the July 29 request for copies of the agreement between Respondent and Dovey.

Separately, but also on September 12, Blankenship wrote Smith, repeating her request for the information demanded in the July 29 letter. It specifically requested copies of "any and all documents signed by [Respondent] and/or employee Kim Dovey (signed during July 2005) regarding termination of her employment, severance pay relating to her termination of employment and/or release of claims." By September 12, it would appear the Union was no longer asserting that unlawful direct dealing had occurred, but now it wanted the signed documents which reflected her termination, her pay and any release of claims. It ended by asserting that it had "the right to this information."

It should be observed here that there is no contention that Dovey has filed any grievance, much less one concerning her departure from employment.

Smith replied to both by e-mail on September 20 saying: "As I stated in my e-mail message of August 15th [Respondent] has not executed any agreements with Kim Dovey (or any other [union] member) pertaining to the terms or conditions of their employment."

In addition, a document under seal has been presented for my review, and I have reviewed it *in camera*. Although not specifically stated in the stipulation, it would appear that Respondent, at least, and perhaps the General Counsel (but not the Charging Party) are aware of its contents. Without breaking the seal of confidentiality, I can make the following observations about its contents: (1) the document is titled "Separation Agreement;" (2) it constitutes Dovey's resignation; (3) it recites that she has been paid her earned salary, vacation pay and any other amounts owed through the termination date; (4) it provides for a lump sum in exchange for a release of any tort claims arising from her employment, listing various statutes[3] and common-law theories which might support such a claim; (5) it includes a limited nondisclosure clause barring her from advising others concerning the terms of the agreement, along with certain exceptions, such as being required by law to disclose its terms and also allowing her to disclose those terms to her spouse, her attorney, her accountant, and any other professional advisor who might need the information. It provides Respondent with a legal remedy if she were to breach the nondisclosure clause.

Nevertheless, the nondisclosure portion of the agreement is not reciprocal. It does not in any way bar Respondent from revealing either the agreement itself or its terms, even if such a revelation were somehow to negatively impact Dovey. Neither is there any agreed-upon consequence if it were to do so.

Respondent, like the other parties, filed a position statement together with the factual stipulation. Although not evidence or an evidence substitute,[4] it nonetheless provides a context for its defense. In the position statement it observes that Dovey resigned because she had become the victim of another employee's having revealed certain personnel information about her. Whether Dovey resigned due to such a happenstance is not a consideration here.

Nonetheless, the position statement illuminates the reason for the tort claim waiver set forth in the Dovey separation agreement. If another employee reveals material in an employee's personnel file, whether publicly or only to coworkers, that conduct may well be grounds for a successful invasion of privacy suit in tort by the wronged employee under the tort's "public disclosure of private facts" or the "intrusion upon one's affairs" subcategories. (See any treatise on torts for a full explication.) In California, the situs of this case, there is a State constitutional provision which protects its people from such incursions.[5] Respondent was prudent to seek a waiver from

[3] The NLRA is not among the statutes listed.

[4] Respondent's brief inappropriately refers to an affidavit provided to the Regional Office which is not a part of the stipulation. That portion of its brief has not been considered.

[5] See art. I, sec. 1 of the California Constitution, the declaration of rights, which reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." See also the various invasion of privacy statutes which California has legislated and which provide for a cause of action. Some of its prohibitions are criminal in nature, such as those against wiretapping. In fact, California Penal Code § 631, though aimed primarily at communication systems, probably covers office computer network searches where one merely views the private material. Section 632 is even broader.

A very recent example demonstrating the importance of this privacy right may be seen in *Kearney v. Salomon Smith Barney*, __ Cal. 4th __; __ Cal.Rptr.3d __; 2006 WL 1913135 (July 13, 2006), where the California Supreme Court found the Georgia branch office of a brokerage house which also does business in California, and which had relied on

Dovey since it might well have been liable to her, under principles of respondeat superior, for the injustice committed upon her by the other employee.

Legal Analysis

This case arises under the general legal matrix that an employer must supply, upon appropriate demand, information to the employees' statutory representative information which is relevant to either the collective bargaining or the representational processes. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). See also *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963). Claims of confidentiality and privilege can insulate the employer in some circumstances. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In that event, the burden of rebutting the producibility and of proving confidentiality or privilege is on the employer. *E. I. du Pont de Nemours & Co.*, 346 NLRB 553 (2006); *Wayne Memorial Hospital*, 322 NLRB 100, 104 (1996); *Washington Gas Light Co.*, 273 NLRB 116 (1984); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976), and others.

The initial issue is whether the General Counsel has demonstrated that Dovey's severance agreement is producible under ordinary standards.

It is fair to first observe that the Union really didn't know what it was seeking when it wrote its initial letter. It was operating under the belief that something approaching undermining its status had occurred. It thought that there had been direct dealing and was seeking evidence of it. As Smith responded, its view shifted, apparently deciding that it needed the underlying document to determine what had actually happened.[6] Smith's indirect reply did not give the Union much comfort, though Smith clearly denied that he had encroached into the field reserved for the collective-bargaining agent. From the Charging Party's perspective, Smith's statement: ["As I stated in my e-mail message of August 15th . . . [Respondent] has not executed any agreements with Kim Dovey (or any other [union] member) pertaining to the terms or conditions of their employment,"] relied too much on a legal conclusion. There were no facts to support it, even if Smith was correct. Had Smith told the Union what the agreement actually accomplished, he would have stood a better chance of persuading it that he had not interfered with its representative status.

Smith's reply only generated more interest. Yet, instead of picking up the phone and explaining their respective interests, where a resolution might have been reached, each party decided to remain at distance, standing on their own legal niceties. This approach is not conducive to a mature relationship. Surely both sides need to work on improving communications. That failure took the matter to the Board.

For the Board to order the agreement turned over to the Union, it must be shown to be relevant to either the collective-bargaining process or to the Union's role as the employees' collective-bargaining representative. At the outset, it can be said that there are two types of relevance, presumptive and nonpresumptive. Insofar as normal bargaining matters are concerned, they will be deemed presumptively relevant if they fall within the parameters of Section 8(d) of the Act as a "wages, hours or terms and conditions of employment" issue.[7] Where the demand seeks presumptively relevant data the employer is deemed to understand its obligation promptly to provide such material. Its failure to do so breaches the Section 8(d) bargaining obligation unless it can effectively rebut the presumption. Nevertheless, some other legitimately needed information, not presumptively relevant, might be producible in the same way if the Union satisfactorily explains that it is pertinent, or if relevance is evident from circumstances.

Producibility in cases where the Union is seeking to perform its representational duties becomes a little more problematic because there are many instances where relevance to that function is not readily apparent. Generally, the more readily apparent relevant material is that sought by a union to oversee its collective-bargaining contract or to seek information relating to a grievance. These usually stay in the realm of self-evident relevance or its significance can easily be inferred. Where the information being demanded is actually relevant but its import is not reasonably discernible from the demand, producibility becomes problematic, at least until the union specifically demonstrates relevance in the face of the employer's opposition. Specifically, see *American Stores Packing Co.*, 277 NLRB 1656, 1659 (1986); *Emery Industries*, 268 NLRB 824, 825 (1984); *Leonard B. Herbert Jr. & Co.*, 259 NLRB 881, 883 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983); *Western Massachusetts Electric Co.*, 228 NLRB 607, 623 (1977), enfd. as modified 573 F.2d 101 (1st Cir. 1978).

As can be seen, the Union here demanded a copy of Dovey's "severance package," first explaining that it believed it was the product of an unlawful direct dealing within the meaning of Section 8(a)(5). Although it seemed to later have moved away from its "direct dealing" theory, it never explicated its need for the information.[8] It simply claimed it had "the right to this

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Georgia law to permit one-party telephone eavesdropping, to be subject to the above-cited California law, using the governmental interest analysis in determining the choice of law to be applied. This, in my opinion, demonstrates how strongly the California courts will enforce California privacy rights, reaching even into conduct partially committed in another state.

[6] In its brief, the Charging Party has renewed its claim that Respondent's conduct qualifies as unlawful direct dealing. Since the complaint does not allege such a violation, the issue will not be pursued here. However, I direct the Union to the first proviso of Sec. 9(a) of the Act which permits employees to present grievances to their employer and have them adjusted without the intervention of their bargaining representative so long as the adjustment is not inconsistent with the collective-bargaining contract.

[7] Sec. 8(d) [Obligation to bargain collectively] "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ..." [Emphasis added.]

[8] The stipulated record does not describe whether the Union's position shift was ever transmitted to Respondent. If not, Respondent would have been left to think that direct dealing was the issue, not the terms of the severance package.

information." Yet, rather clearly there was no bargaining purpose, since the contract will not expire until 2008. Therefore, bargaining for a new contract cannot be presumed. See, *Emery Industries*, supra. Nor did it cite a contract policing purpose. No employee had complained and if the Union was concerned about proper wages being paid, it could simply have asked for Dovey's payroll records. Instead, it sought Dovey's "severance package" and said nothing about its reasons. That suggests the Union seeks the information to carry out its representational duties. And, of course, that is what the General Counsel's complaint-stated theory is. Yet even the General Counsel has not stated what the Union's representational purpose is here.

The question raised, therefore is, how the does production of Dovey's separation agreement have relevance to its duties as the collective-bargaining representative? There is no evidence that the Union is seeking to represent Dovey in any dispute. If the Union sees its duty as representing the whole of the bargaining unit, such a scope has never been stated. One might surmise that it seeks information concerning Dovey's waiver of the tort claim. But that is not a "wage, hour or term and condition of employment" subject matter. It is only a private affair between a potential plaintiff and a potential tortfeasor who happens to be in an employer-employee relationship at the time the presumed tort occurred. Consequently, the waiver is only concerned with remedying a matter unrelated to Dovey's collectively-bargained employment relationship.[9] The Union's only representational concern is how employment is regulated;[10] it can have no concern over a tort which has no connection to that regulatory plan.

It is Dovey who putatively suffered the tort. Of course she was free to ask the Union for advice about her tort claim if she wished, but here she clearly did not think she needed outside help and chose not to seek it. But Dovey's only issue, once she decided to waive her tort claim, was to negotiate an amount that would satisfy her personal sense of how she had been wronged. That is not a wage or term and condition of employment and no party has cited a case holding that it is. My research has not found one, either. Certainly it is not a payment in exchange for work.

Therefore, the Union has no duties to perform regarding this tort, not even how or if, it was remedied. That is a matter between the plaintiff and the defendant. The Union simply has no role to play.

Furthermore, the Board has held, as Respondent argues, that employers do not violate Section 8(a)(5) and (1) of the Act when they condition receipt of enhanced severance benefits upon the employee's execution of a general release of liability. Specifically, see *Phillips Pipe Line Co.*, 302 NLRB 732 (1991). There, the Board observed that it had earlier held general releases of liability have too attenuated a link to actual terms and conditions of employment to constitute, in and of itself, a mandatory subject of bargaining, citing *Borden, Inc*., 279 NLRB 396, 399 (1986). It did observe that fact patterns have occurred where the mandatory and nonmandatory subjects became so intertwined as to treat the nonmandatory matters as if they were mandatory. Even so, there is no contention that such entangling has occurred here. In fact, the Board has also said that where the union has not indicated with specificity the relevance of the material which it seeks, it will not sift through the information to determine its relevance. *The Bendix Corp.*, 242 NLRB 62 (1979). Indeed, that duty rests with the Union, not the Board. *American Stores Packing Co.*; *Emery Industries*; *Leonard B. Herbert Jr. & Co.*; *Western Massachusetts Electric Co.*, all supra. Also, *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984). Similarly, the Charging Party here has failed to describe the relevance of the material sought with the requisite specificity.

It should also be noted that here, as in *BP Exploration (Alaska)*, 337 NLRB 887 (2002), the Union insisted upon the actual document, not the information contained in the document. This insistence did not inform Respondent of what the Union's purpose was. Respondent believed it had the right to keep the substance of the agreement private. Aside from whether its belief was well-founded, it also knew that the tort settlement provision was not something which the Union could demand as presumptively relevant to any legitimate union purpose or need. It was, therefore, privileged to keep its terms private until the Union explained its purpose. But the Union never has; instead, it filed the unfair labor practice charge.

Accordingly, I conclude that Respondent is not obligated to provide the Dovey "separation package" to the Charging Party. Neither it nor the General Counsel has demonstrated that its contents are relevant to any union duty to its represented employees.

In the event that the Board declines to agree with my findings concerning Respondent's right to await proof of relevance, it will then face Respondent's defense that Dovey's separation package need not be disclosed because of its confidential nature. It is therefore appropriate to deal with that issue in order to avoid a remand on the point. *West Penn Power Co.*, 339 NLRB 585 (2002).

However, Respondent has not presented any facts which warrant treating the severance package as confidential. The only fact which even suggests that Dovey wishes her severance agreement to be confidential is actually one which serves Respondent's self-interest, not hers. She has been silenced by the terms of the agreement, but she is not the one to whom the Charging Party's demand is directed. She hasn't been asked and it is her privacy interest which we must consider, not Respondent's.

My *in camera* review of the agreement demonstrates rather clearly that nothing found therein evidences her desire to keep the terms of the agreement confidential. It is only Respondent, the drafter, which asked for nondisclosure—by her, not by it; the duty the agreement imposes on her is designed not to pro-

[9] Cf. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), where the Supreme Court held that a union-represented employee's wrongful discharge tort complaint, under a theory of retaliation for filing a workers compensation claim, was not preempted by the Act as the collective-bargaining agreement was not implicated and did not need to be interpreted. Similarly here, neither the collective-bargaining agreement nor the union's status as the employees' bargaining agent are implicated in Dovey's decision to settle a potential tort claim.

[10] See *J. I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944). There the Court observed that a collective-bargaining agreement regulates employment, comparing it to a trade agreement.

tect her, but to protect Respondent. Accordingly, Respondent does not, because it cannot, point to any privacy interest which Dovey has sought to protect. Respondent cannot claim to be Dovey's protector. It has no standing to do so.

And, since the only confidential interest it is protecting its own, the burden to demonstrate that the matter is confidential to it rests upon Respondent. See *Detroit Edison Co.* and *E. I. du Pont*, both supra, and cases cited. It has not met that burden whatsoever. Similarly, the facts do not demonstrate that Respondent has sought to accommodate whatever confidentiality defense it can muster. See, for example, the type of accommodation made in *National Steel Corp.*, 335 NLRB 747, 748 (2001), cited in *E. I. du Pont*. There is no evidence that it has responded to the Union by proposing to supply something less than the severance agreement itself. I find that curious since Respondent has carefully parsed the request for the information as a "package" rather than the agreement itself. It clearly sees the difference between the underlying material and the agreement itself. Despite its recognition that there may be room for providing something less than the agreement itself, it never made such a proposal. I recognize that may well be the product of its failing to see beyond the Union's initial claim that the separation agreement was improper direct dealing. Nevertheless, its claim of confidentiality is not factually supported.

Accordingly, I find that Respondent has failed to demonstrate that Dovey's separation agreement is a confidential document. Therefore, it cannot invoke the defense of confidentiality. To the extent that confidentiality has been raised as an affirmative defense, it is rejected.

Yet, the fact remains that the Union has failed to demonstrate that the "separation agreement" is relevant to its duty as the exclusive collective-bargaining representative of the bargaining unit employees. The complaint should be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Northern United Legal Assistance Workers, National Organization of Legal Services, UAW Local 2320 is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove that the severance agreement between Respondent and its former employee Kimberly Dovey has any relevance to either collective bargaining or to the Union's duties as the employees' collective-bargaining representative.
4. Respondent has not engaged in the unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 7, 2006

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.